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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ALLEN HAMMLER, Defendant and Appellant.	B198947 (Los Angeles County Super. Ct. No. TA087967)

APPEAL from a judgment of the Superior Court of Los Angeles County. Paul A. Bacigalupo, Judge. Convictions affirmed; remanded for resentencing.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Stephanie C. Brenan and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

Allen Hammler was convicted of two counts of forcible rape (Pen. Code,[1] § 261, subd. (a)(2)), two counts of oral copulation (§ 288a, subd. (c)(2)), and two counts of false imprisonment by violence (§ 236). On appeal, he contends that the trial court committed reversible error when inquiring into a reported jury deadlock and ordering further deliberations; that the convictions should be overturned because a support person was permitted to testify after accompanying a victim to the witness stand; that the trial court erred and violated his right to due process when uncharged acts of sexual misconduct were received in evidence; that the court gave constitutionally defective jury instructions; and that the trial court made several sentencing errors. We remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

Sisters J.S. (14 years old) and D.S. (15 years old) were waiting for a bus home from cheering at their high school basketball game when Hammler approached and persuaded D.S. to accompany him and a companion to a store. J.S., unwilling to leave her sister alone, followed. Hammler then took them to a nearby hotel, where he refused to let them leave and threatened to shoot or kill them if they did not comply with his orders. He ordered the victims to undress, and they complied. Hammler forced his penis into D.S.'s vagina and then made her orally copulate him. He later attempted to have sexual intercourse with J.S., causing his penis to slightly penetrate her vagina, and forced her to orally copulate him as well. Hammler forced both girls to sniff a rock-like substance that burned their noses. Hammler kept them overnight and released them the following morning.

Hammler was charged with two counts of forcible rape, two counts of forcible oral copulation, three counts of false imprisonment by violence, and one count each of first degree residential burglary (§ 459), assault with a firearm (§ 245, subd. (a)(2)), and

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[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

criminal threats (§ 422). Numerous enhancement allegations were pleaded. At trial, the court permitted the introduction of evidence of a prior sexual offense against a different victim that led to a conviction. The court also permitted the victims' mother, who was designated as D.S.'s support person pursuant to section 868.5 and who had not testified before D.S. did, to testify as a rebuttal witness.

During deliberations, the jury sent out a note that indicated that it had reached a verdict on three counts but was deadlocked on all other counts. The court asked the foreperson, "[W]hat is the situation right now as it stands to [count] No. 1?" The foreperson responded, "It's 11 to 1—" and the court interjected, "You know what, I don't want you to tell me what the vote is. When I say 'situation,' that was probably not clear. I was not making myself clear . . . ."

The court then confirmed that there was no unanimous vote on that count, and asked whether there was anything the court could do to assist the jury in reaching a unanimous verdict on that count. The foreperson stated a belief that there was nothing the court could do. When the court asked whether clarification of a jury instruction or the reading of testimony would help the panel, the foreperson suggested that the court "personally . . . talk to this person that—that's not agreeing with the rest of us." The court responded that this would be "inappropriate" and that it "can't do that." The court then asked the panel whether the court could do anything to assist the jury in reaching a verdict. Juror No. 5 made comments concerning witness credibility, but did not believe that clarification of the jury instruction on judging credibility would be helpful or that additional testimony readbacks were needed.

The court then inquired as to the history of voting on this count. The foreperson revealed that they had taken numerous votes on count 1, and that the vote was consistently 11 to 1. Juror No. 5 expressed the opinion that if everyone "would consider the testimony true, you know, and they believed the credibility of the person, we wouldn't have this problem." All other jurors indicated that there was nothing the court could do to assist them in reaching a verdict on count 1.

On counts 3 and 5, the foreperson reported that each of the four or five ballots resulted in an 11 to 1 split, and the jury indicated there was nothing the court could do to assist them to reach a unanimous verdict on those counts. The foreperson reported that the jury was split 6 to 6 on count 7, 8 to 4 on count 8, 6 to 6 on count 9, and 6 to 6 on count 10. The jurors agreed that there was nothing else the court could do to assist the jury on these counts.

The court held an in-chambers consultation with counsel, during which the prosecutor requested that the court inquire whether clarification of the instructions relating to assessing witness credibility and sufficiency of the evidence would be helpful. When asked by the trial court for his view, defense counsel responded, "Certainly, you can inquire. I don't know if it will make any difference."

The court then called the panel back and told the jurors, ". . . I got a sense from some of the jurors in discussing their responses about the jury instructions on two topics; one was credibility of witnesses and another related to the sufficiency of the evidence as it relates to one witness. [¶] Is there anyone that would like me to reread those particular jury instructions?" Juror No. 5 raised her hand. The court asked the jury to retire to "further discuss this amongst yourselves and put into a question exactly what it is that you'd like me to read to you."

When the jury returned, the foreperson revealed that the jury had now reached verdicts on counts 1, 3, and 5 but that it was hopelessly deadlocked on counts 7 through 10. No juror disagreed with the foreperson's assessment of the deadlock.

The jury found Hammler guilty on counts 1 through 6. With respect to counts 1 through 4, the jury found true special allegations pursuant to sections 667.61, subdivisions (e)(5) and (e)(7). Hammler was sentenced to a total term of 124 years to life in prison. He appeals.

DISCUSSION

I. Inquiries During Deliberations

Hammler argues on appeal that the trial court erred by asking the foreperson the numerical breakdown of the jury's votes, that the court should have declared a mistrial after all 12 jurors indicated a hopeless deadlock, and that the court effectively instructed the holdout juror to change his or her vote. Hammler claims that the judge interfered with the deliberative process and that his convictions must therefore be reversed. We find no error here.

First, Hammler contends that the judge here asked "for the breakdown of votes for guilt and votes for acquittal." Hammler does not identify where in the transcript such an inquiry may be found, nor do we find any such inquiry in our review of the record. All the trial court did was to "inquire of the jury as to its numerical division without seeking to discovery how many jurors are for conviction and how many are for acquittal," a permissible inquiry under California law. (*People v. Carter* (1968) 68 Cal.2d 810, 815 (*Carter*), abrogated on other grounds by *People v. Gainer* (1977) 19 Cal.3d 835, 851-852.) In response to the court's neutral inquiries, Juror No. 5 volunteered comments concerning credibility that tended to suggest that the 11 to 1 division on three counts was 11 to 1 in favor of guilt. The court, however, never inquired into the nature of the voting division.

Next, Hammler argues that the court committed constitutional error when it sent the jury back for further deliberation after the 11 to 1 split was revealed. Hammler notes that the only "help" requested by the jury was for the court to speak with the holdout juror or to advise that juror to accept as true the testimony of a witness deemed credible, claims that the process "was incredibly coercive," and concludes that "it is little wonder that the individual who had stuck to his convictions for three days of deliberations and over the weekend, quickly caved in after going back into deliberations." Hammler relies on *Carter, supra,* 68 Cal.2d at page 816, in which the Supreme Court explained, "The

urging of agreement in such circumstances of course creates in the jury the impression that the court, which has also heard the testimony in the case, agrees with the majority of jurors. Coercion of the jurors in the minority clearly results." The *Carter* decision, however, does not stand for the proposition that it is necessarily coercive for the trial court to send the jury for further deliberations whenever the court knows or may reasonably conclude how the jurors are split on each side of the ultimate issue of guilt. Instead, the *Carter* court observed that when adjuratory remarks are held to be coercive, it is usually in circumstances where the court knows not only the numerical division of the jurors but also how the jurors stand as to the question of guilt. (*Id*. at p. 816.) In such cases, comments made urging additional deliberations admittedly have higher coercive potential. (*Ibid*.) But whether the trial court's statements or actions are coercive turns on the facts and circumstances of each case. (*Id.* at pp. 816-817.) It is not inherently coercive to direct the jury to resume deliberations once an 11 to 1 split in favor of conviction has been disclosed. (*People v. Bell* (2007) 40 Cal.4th 582, 617.)

Here, the trial court never "urg[ed] agreement" by the jurors (*Carter*, *supra*, 68 Cal.2d at p. 816), nor did it send the jury back for additional deliberations on the question of guilt. The court merely inquired as to each outstanding count whether there was anything the court could do to facilitate a unanimous verdict. When one juror asserted that a re-reading of some jury instructions on two subjects would be of assistance, the court requested that the jury retire—not for the purpose of further substantive deliberations, but for the purpose of formulating a request for jury instructions to be read. Rather than returning with that request, the jury returned with a verdict on three additional counts. While there was the potential of coercion here, that "potential of coercion was not realized by anything said or done by the court in this case." (*People v. Sheldon* (1989) 48 Cal.3d 935, 960 (*Sheldon*).)

While Hammler contends that a reasonable juror could have concluded from the court's inquiries that "the process would not end until that single vote was changed," our reading of the transcript causes us to draw no such inference from the trial court's queries, nor has Hammler identified any statements that would suggest any pressure

brought to bear on the holdout juror. To the contrary, the trial court directly refused as inappropriate the jury's requests to intervene with the holdout juror, it asked the jury to identify what, if anything, the court could clarify to assist the jurors, and it made no improper or coercive comments concerning the clarity of the evidence, the simplicity of the case, or negative consequences of failing to reach an unanimous verdict. (See *Sheldon*, *supra*, 48 Cal.3d at pp. 959-960.) Hammler has not demonstrated that "the remarks of the court, viewed in the totality of applicable circumstances, operate[d] to displace the independent judgment of the jury in favor of considerations of compromise and expediency" (*Carter*, *supra*, 68 Cal.2d at p. 817), and he has therefore not established error here.

II. Rebuttal Testimony of Victims' Mother

When D.S. began to cry during her trial testimony, the court granted the prosecutor's request that her mother be permitted to remain with her at the witness stand as a support person pursuant to section 868.5. The mother had not testified and the prosecutor informed the court that he did not intend to call her as a witness. The mother was not present in court the following day when Hammler testified. Hammler described prior conversations with D.S. and that she pushed him to ask for her phone number; testified that he believed that D.S. and J.S. were college students and neither knew or had any reason to know that they were in high school from the uniforms they were wearing; and stated that D.S. and J.S. were "acting" when they claimed to have been traumatized because he had seen them laughing on the witness stand at a pretrial hearing.

After Hammler's testimony, the prosecutor sought permission to examine the victims' mother as a rebuttal witness. He explained although he had no prior plan to have her testify, Hammler's testimony created the need to present rebuttal evidence on three topics: her observations of the first time that Hammler and D.S. had met; the fact the victims were wearing high school cheerleading uniforms that clearly stated "C.H.S." for

Cabrillo High School; and the victims' demeanor when they returned home the morning after the offenses. The trial court permitted the rebuttal testimony.

Section 868.5 contemplates that when a support person is also a prosecution witness, the witness's testimony should be taken before the individual acts as a support person. (§ 868.5, subd. (c).) This statutory provision is "intended to guard against the possibility that the support person will tailor his or her testimony to match that of the complaining witness." (*People v. Redondo* (1988) 203 Cal.App.3d 647, 654 (*Redondo*).) The procedure set out by section 868.5 works smoothly when the support person's testimony is anticipated prior to the victim's testimony; in that case the procedure in subdivision (c) may be followed without complication. But when events occurring after the victim's testimony cause the prosecutor to wish to call the support person as a witness, testimony given in compliance with the sequence set forth in section 868.5, subdivision (c) is no longer possible.

Hammler argues that the testimony was inadmissible because of the impossibility of compliance with section 868.5, subdivision (c), but we disagree. When a prosecutor could not have known at the time of the victim's testimony that the testimony from the support person would later be needed, section 868.5, subdivision (c) does not prohibit the support person's later testimony. (*Redondo*, *supra*, 203 Cal.App.3d at p. 653 [permitting witness/support person to be recalled to the stand when evidence requiring additional testimony was made known to prosecutor only after initial testimony and subsequent service as support person].) Just as section 868.5, subdivision (c) does not prevent a support person from being recalled to testify as to evidence which the prosecution, acting in good faith, fails to discover until after the victim has begun to testify (*id*. at p. 654), there exists no rationale for preventing a support person from being called to testify on rebuttal concerning matters not at issue during trial until the prosecution's case-in-chief has concluded and the defense has begun to present evidence, at least where, as here, the support person was not present for the presentation of the defense evidence that necessitated the presentation of rebuttal testimony. In both cases, a contrary rule would

offer at most marginal benefits that would be "vastly outweighed by the cost of keeping admissible evidence from the jury." (*Ibid*.)

Despite the holding in *Redondo*, *supra*, 203 Cal.App.3d 647, Hammler argues that the necessity of safeguarding against the possibility of testimony tailored to the testimony of the complaining witness requires that all testimony of a support person be excluded if it was not received prior to the testimony of the victim. Here, however, there was no possibility of the support person tailoring her testimony to that of the complaining witness. The victims' mother's rebuttal testimony was limited to her observations of a prior meeting between D.S. and Hammler, a description of the cheerleading outfits that the victims were wearing; a description of how they victims acted the morning after the rapes, and statements concerning a breakdown that J.S. recently had when preparing for trial. None of these issues was a subject of D.S.'s testimony, and none was a material issue in the trial until Hammler testified. Therefore, there is no possibility that by acting as a support person to D.S. her mother had the opportunity to tailor her testimony to match D.S.'s account of events. Hammler has not shown any error of state or federal law with respect to the receipt of this testimony.

III. Admission of Evidence of Uncharged Acts

During the prosecution's case-in-chief, the trial court permitted, under Evidence Code section 1108, evidence of Hammler's conduct with D.G. in 1998 that led to a sexual battery conviction. Hammler argues that this evidence should not have been admitted because it was dissimilar to the events charged in the present case and too remote, and he asserts that the error in admitting the evidence was of federal constitutional magnitude. There was no error here.

Pursuant to Evidence Code section 1108, Hammler's prior conduct was admissible at trial, subject to the constraints of Evidence Code section 352. (Evid. Code, § 1108, subd. (a); see also *People v. Britt* (2002) 104 Cal.App.4th 500, 505.) Among the factors to be considered in balancing the probative and prejudicial impact of evidence of another

sexual offense are its "nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.)

There was no abuse of discretion in admitting the evidence of Hammler's sexual offense against D.G. The nature of the offense was not dissimilar to the charged offenses: in both instances Hammler led his victim away from populated places to a relatively isolated place, placed her on the floor, and then sexually assaulted her. Moreover, in the earlier case Hammler claimed that the victim consented, making his prior offense—which led to a conviction for sexual battery—relevant in evaluating credibility here. The earlier assault was not particularly remote in time, occurring between six and seven years prior to the charged offense. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 405 [12 years not too remote]; *People v. Ing* (1967) 65 Cal.2d 603, 612 [offense 15 years earlier was not too remote].) The testimony was not particularly inflammatory in nature, and it was certainly no more inflammatory than the offenses with which he was charged here involving an extended attack on two minor victims. As the jury learned that Hammler had been convicted of sexual battery, it was unlikely that jurors would have assumed that he had not been punished and thus have attempted to punish him for those offenses in the current proceeding. (See *People v. Callahan* (1999) 74 Cal.App.4th 356, 371.) The evidence, moreover, did not consume excessive amounts of time. The evidence of the prior sexual offense was sufficiently probative to merit the small investment of time its elicitation required. There was no error in admitting this testimony under Evidence Code section 1108.

IV. Alleged Instructional Error

Hammler contends the trial court violated his substantial rights by instructing the jury with CALCRIM Nos. 361, 1191, and 220. We note at the outset that Hammler did not object to any of the instructions he challenges on appeal. Nonetheless, his claims are reviewable if the alleged errors affected his "substantial rights." (§ 1259.) "Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was." (*People v. Anderson* (1994) 26 Cal.App.4th 1241, 1249.) We therefore examine Hammler's claims and conclude that Hammler has not established any prejudicial instructional error.

A. CALCRIM No. 361

CALCRIM No. 361 instructs the jury that if a testifying defendant failed to explain or deny evidence against him, and if he could reasonably have been expected to have done so based on what he knew, that failure can be considered in the evaluation of the evidence, with the provisos that a failure to explain or deny evidence is not sufficient by itself to prove guilt, the prosecution retains the burden of proving guilt beyond a reasonable doubt, and the jury is charged with determining the meaning and importance of the failure to explain or deny evidence. The instruction should only be given when the defendant failed to deny or explain facts or evidence in the prosecution's case. (*People v. Saddler* (1979) 24 Cal.3d 671, 682 [concerning CALJIC No. 2.62, which is similar to CALCRIM No. 361] (*Saddler*).)

Hammler claims that "there was no indication" that before giving CALCRIM No. 361 the trial court analyzed his testimony to determine whether he had in fact failed to explain and deny evidence; he also claims that he did not fail to explain or deny any material facts or evidence, so the instruction should not have been given. We disagree. While the trial court did not announce that it performed the analysis, on a silent record we

presume that the court followed the law. (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496.) Moreover, the instruction is appropriately given when the defendant's testimony, while superficially accounting for his conduct, nonetheless appears bizarre or implausible (*People v. Belmontes* (1988) 45 Cal.3d 744, 784, disapproved on other grounds in *People v. Doolin* (Jan. 5, 2009, S054489) __ Cal.4th __ [09 C.D.O.S. 60]), as was Hammler's story here that these two children abandoned their plans to continue their long journey home from cheerleading at a school function for a voluntary night of sex and drugs with two strangers in a seedy motel, choosing along the way to be paid for sex, then to return the money; to inhale drugs despite one of them having asthma; and to deceive Hammler as to the fact that they were high school students despite wearing their high school cheerleading uniforms.

Even if the instruction were improper, it could not have been prejudicial. Error in giving this instruction is only prejudicial if it is reasonably probable a more favorable verdict would have resulted had it not been given. (*Saddler*, *supra*, 24 Cal.3d at p. 683.) The instruction did not direct the jury to draw an adverse inference and contains other portions favorable to the defense, such as cautioning that the failure to deny or explain evidence is not sufficient alone to prove guilt and reminding the jury that the prosecution must prove each element of the crime beyond a reasonable doubt. (See *People v. Ballard* (1991) 1 Cal.App.4th 752, 756 [interpreting CALJIC No. 2.62].) Moreover, the jurors were told to disregard any instructions that were not supported by the facts (CALCRIM No. 200), and it is therefore reasonable to presume that if there was no evidence to support CALCRIM No. 361, they would have ascertained that fact and disregarded the instruction in reaching their verdict. (*Saddler*, at p. 684 [referring to CALJIC No. 17.31].) Accordingly, we find no reasonable likelihood of a different verdict had the instruction not been given.

B. CALCRIM No. 1191

CALCRIM No. 1191, concerning the testimony of the prior act of sexual battery against D.G., was given to the jury. Hammler argues that the instruction unconstitutionally lowers the prosecution's burden of proof. He acknowledges that the issue was decided adversely to his position with respect to CALCRIM No. 1191's predecessor instruction, CALJIC No. 2.50.01, in *People v. Reliford* (2003) 29 Cal.4th 1007, but he disagrees with that decision and argues extensively against it. We are, of course, bound by the California Supreme Court's decision in *Reliford*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) The reasoning of *Reliford* has been extended to the comparable instruction given here, CALCRIM No. 1191 (*People v. Cromp* (2007) 153 Cal.App.4th 476, 480), and Hammler has not offered any salient distinction or argument to demonstrate that *Reliford* should not apply to this instruction. There was no error here.

C. CALCRIM No. 220

Hammler complains about the use of CALCRIM No. 220 concerning reasonable doubt. He first claims that CALCRIM No. 220 limited the jury's determination of reasonable doubt to the evidence received at trial and precluded it from considering the purported lack of other evidence corroborating what he calls "weak eyewitness testimony." Preliminarily, a case in which the two victims identified their assailant, the sexual offenses were observed by a third party, and DNA consistent with the defendant was recovered from both victims can hardly be considered a matter with a lack of evidence to corroborate weak eyewitness testimony. More importantly, Hammler's claim that the instruction is deficient has been considered and rejected in numerous appellate decisions. (E.g., *People v. Garelick* (2008) 161 Cal.App.4th 1107, 1117-1119; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1237-1238; *People v. Guerrero* (2007) 155 Cal.App.4th 1264, 1267-1269; *People v. Flores* (2007) 153 Cal.App.4th 1088, 1091-

1093; *People v. Westbrooks* (2007) 151 Cal.App.4th 1500, 1509-1510.) We agree with the analyses and conclusions of those cases. The language in CALCRIM No. 220 of which Hammler complains is not susceptible of interpretation as precluding a jury from considering the lack of evidence in determining whether the prosecution has proved its case beyond a reasonable doubt. Rather, the instructions merely inform the jury the People may not meet their burden of proof based on evidence other than that offered at trial.

Hammler next contends that CALCRIM No. 220 lowered the prosecution's burden of proof. He argues that by advising the jury to "impartially compare and consider all the evidence," the instruction undermines the presumption of innocence and replaces it with "a mere civil standard of impartiality." This argument, too, is a strained construction of the jury instruction that has been rejected by other courts. The instruction reminds the jury that the prosecution is required to prove each element of the charged offenses and that the defendant's guilt must be proven beyond a reasonable doubt. There is no reasonable likelihood that the jury interpreted CALCRIM No. 220 to weigh the evidence in a manner akin to a preponderance of the evidence standard. (*People v. Stone* (2008) 160 Cal.App.4th 323, 331-332.)

V. Sentencing

The One Strike Law, section 667.61, provides an alternative, harsher penalty for particular sex crimes committed under specified circumstances. (*People v. Acosta* (2002) 29 Cal.4th 105, 118.) Rather than treating this statute as an alternate sentencing provision, the trial court considered it a sentencing enhancement. Therefore, the court imposed the midterm sentence of six years on counts 1 through 4, and then for each count imposed an additional and consecutive term of 25 years to life. This was error. As of the time of the offenses here, section 667.61, subdivision (a) provided, "A person who is convicted of an offense specified in subdivision (c) under one or more of the circumstances specified in subdivision (d) or under two or more of the circumstances

specified in subdivision (e) shall be published by imprisonment in the state prison for life and shall not be eligible for release on parole for 25 years . . . ." The trial court should not have imposed both the statutory midterm sentence and the One Strike Law punishment.

Next, in imposing sentence the trial court relied on amendments to section 667.61 that had not been enacted at the time of the offenses. The court explained that it was imposing four One Strike Law life sentences based on section 667.61, subdivision (i).[2] Subdivision (i) was altered by amendment and by initiative measure after the offenses were committed here. At the time of sentencing, section 667, subdivision (i) required the court to impose a consecutive sentence for each offense if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of section 667.6. This was the trial court's basis for imposing the four life terms.

But this was not the law in 2005, when the offenses were committed. At the time of the offenses, section 667.61, subdivision (i) did not shed any light on the determination of how many life terms could be imposed on Hammler under the circumstances here. Subdivision (i) merely provided that "For the penalties provided in this section to apply, the existence of any fact required under subdivision (d) or (e) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact." Instead, section 667.61, subdivision (g) provided at the time that the indeterminate sentence under the One Strike Law "shall be imposed on the defendant

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[2] The court stated that its authority for its combined sentence of 31 years to life—the midterm sentence plus the One Strike Law sentence of 25 years to life—was sections 667.6, subdivision (d) and section 667.61, subdivision (i). We assume that the court meant for the section 667.6, subdivision (d) reference to be the legal authority for the full, separate, and consecutive base terms, and the section 667.61, subdivision (a) terms based on the later-adopted section 667.61, subdivision (i). If the trial court meant for section 667.6, subdivision (d) to provide a basis for the imposition of the multiple life terms under section 667.61, subdivision (a), this would be error under *People v. Jones* (2001) 25 Cal.4th 98, 105-107 (*Jones*), which specifically rejected the argument that the terms "single occasion" and "separate occasions" in section 667.61, subdivision (g) and section 667.6, subdivision (d) were to be understood by reference to each other.

once for any offense or offenses committed against a single victim during a single occasion. If there are multiple victims during a single occasion, the term specified in subdivision (a) or (b) shall be imposed on the defendant once for each separate victim." The Supreme Court had interpreted this subdivision and held that sex offenses occurred on a "'single occasion' if they were committed in close temporal and spatial proximity." (*Jones, supra,* 25 Cal.4th at p. 107.)

Under the law at the time of Hammler's offenses, Hammler could have been sentenced under the One Strikes Law once for each of his victims, but the propriety of a second One Strikes Law sentence depended on whether the court determined that the offenses were not committed on a single occasion, i.e., that they were not committed in close temporal and special proximity. But at sentencing, the trial court made no finding that the sex offenses here for which One Strikes Law sentences were imposed were not committed on a single occasion, nor does the court appear to have understood that section 667.61 required it to make such a determination before imposing the sentences. As the trial court failed to make the requisite determinations, we vacate the judgment and remand the matter for resentencing.

Our conclusion that the sentence must be vacated and the case remanded for resentencing obviates the need to address Hammler's final argument, that the sentence violated his Sixth Amendment rights.

DISPOSITION

The sentence is vacated and the matter is remanded for resentencing consistent with the principles set forth in this opinion. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.